UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

ELYSIAN BREWING CO. **Employer** **and** **IUOE LOCAL 286** **Petitioner**	**Case 19-RC-082934**

I. EMPLOYER'S REQUEST FOR REVIEW AND GROUNDS

Elysian Brewing Company, the Employer, requests the Board to review the Regional Director's Supplemental Decision on Challenged Ballot and Certification of Representative, dated December 14, 2012 ("Decision"). Grounds:

1. His conclusion that Bill Fairbanks (whose ballot was challenged by the Union) is not an eligible dual-function voter because he did not perform enough bargaining unit work, is erroneous on the record. The Regional Director decided that Fairbanks spends about 20 percent of his time performing unit work, whereas the record shows that 25 to 30 percent of his time is spent performing unit work. Under existing Board case law, this is sufficient to count his ballot. The error is prejudicial because this dual-function employee voted against union representation; if his vote is counted, the Union does not represent a majority in the unit and should not have been certified as the bargaining representative.

2. The Regional Director erred on the law in deciding that the burden of proving the extent of bargaining unit work done by a dual-function employee is on the

Employer, rather than on the Union, as the challenging party. The hearing on the Petitioner-Union's challenge was specifically conducted on the basis that it was the Union's burden to show that Mr. Fairbanks is not eligible to vote:

> Hearing Officer Hickey: So, in off-the-record discussions we've covered a couple of issues, which I will now summarize for the record. First off, I noticed that at the start of the hearing, I had failed to advise the parties of their burdens and Mr. Frazier, since the Petitioner is the party seeking to, seeking to exclude a voter based on their eligibility, i.e., the challenged ballot of Mr. William Fairbanks, it will be the Petitioner's burden to show that he is not eligible to vote. Do you understand?
>
> Mr. Frazier (the Union's attorney): I understand.

Tr. 140:25 -141:9.[1] If, instead, the risk of an ambiguous record is placed on the Employer supporting the voter, not on the party challenging his right to vote, and if the Union does not bear the burden of proof, contrary to what the Hearing Officer stated would be the procedure, this is unfair and either this is contrary to Board rule or policy, or there are compelling reasons to reconsider such a rule or policy. As explained by Chairman Battista, dissenting in *Harold J. Becker Co., Inc.*, 343 NLRB 51 (2004), the party seeking to exclude an individual from voting has the burden of establishing that the person is in fact ineligible. Although the two-member majority in *Becker* placed the burden on the employer, *Becker* is distinguishable. The burden of proof regarding challenged ballots should be clarified and placed on the challenging party.

3. The Regional Director erred in concluding that a dual-function employee who spends 20 percent of his time doing bargaining unit work fails to meet the Board's

[1] "Tr." refers to transcript of hearing before Hearing Officer Daniel Hickey, September 4, 2012.

established standards. Alternatively, if the current standards are a "bright line" 25 percent test, such a policy or rule should be reconsidered and changed.

4. A substantial violation of federal labor policy is committed by throwing out the ballot of Bill Fairbanks, who performs unit work a significant part of his day, and at the same time counting the votes of the two boiler operators, who are only temporary employees without a reasonable expectation of continued employment. As a result, the Regional Director certified a union chosen only by temporary employees who should have been excluded. This result is contrary to a fundamental premise of federal labor law—that the employees who would be represented are the ones who should have a voice in deciding whether to choose representation.

5. Because of what the Regional Director acknowledged to be a misinterpretation by the Hearing Officer of the testimony of the challenged voter (Decision at p. 5 n.7), and since the Regional Director professed to have some questions himself about how to interpret some of Fairbanks' testimony, and especially if any ambiguities in his testimony were resolved in favor of the challenger, contrary to the burden of proof agreed upon during the hearing, the Regional Director should not have denied the Employer's request to reopen the record to clarify Fairbanks' testimony. It was prejudicial error in the proceedings to advise the Employer that the burden of proof was on the Union, then read the transcript as though ambiguities are resolved against the Employer because it, not the Union, is subsequently ruled to have the burden of proof and thus the risk of non-persuasion.

Under all these circumstances, substantial questions of fairness, law and policy are raised by this Request for Review, as further discussed below.

II. SUMMARY OF THE EVIDENCE; ARGUMENT AND AUTHORITY

A. Bill Fairbanks' Maintenance Work Is at Least 25 to 30 Percent of His Job. This Qualifies Him as a "Dual-Function Employee" Entitled to Vote.

Mr. Fairbanks generally works the second shift, arriving between 1 and 2 p.m. and leaving at or around 10 p.m. The first part of his shift, he works on the bottling line, which finishes up around 3:30. Tr. 82:16-18. After that, although he does other things too, he works at maintaining and trouble-shooting the machines until he goes home. In that part of his job, he takes direction from the salaried maintenance mechanic who was excluded as a "supervisor" from voting (Tr. 61:17-21), as does the other part-time mechanic, who did vote in the election and was not challenged.

Mr. Fairbanks himself estimates he spends "30 percent or more" of his time as a maintenance mechanic at the brewery. Tr. 65:9-12; 104:2-13. Joe Bisacca, the CEO of Elysian Brewing who has been directly involved in the construction and staffing of the new brewery, views Mr. Fairbanks' split as essentially half-and-half, although he concedes Mr. Fairbanks would be a better judge of the split. Tr. 20:3-13. Working at least 25 percent of his time as a maintenance mechanic, Mr. Fairbanks would qualify as a dual-function employee entitled to vote under current Board decisions. *Medlar Electric, Inc.*, 337 NLRB 796 (2003) (25 to 30 percent is sufficient); *WLVI, Inc.*, 349 NLRB 683 n.5 (2007) (25 percent suggested as a guideline); *AVCO Corp.*, 308 NLRB 1045, 1047 (1992) (employee spending 25-50 percent of her time doing unit work was eligible).[2]

[2] Whether doing unit work 20 to 25 percent of the time, as the Regional Director found Fairbanks does, is sufficient is not decided by Board precedent.

Mr. Fairbanks emphasized (multiple times in his testimony) the difficulty in identifying each job assignment he performed and in stating how long it took on a "typical day," because of variations in what he does and when he does them. There are days—maybe one out of five—that he works a day shift, when he estimates the split of his work is 75/25 between his "day job" on the bottling line and his night job doing some maintenance and repair. Tr. 100:14 – 101:22. There are also days when he has done no bottling work during the day—the bottling line is not operating—so what he does on those days is the maintenance work he typically would do on a night shift. Tr. 155:23 – 157:9.

Mr. Fairbanks works an eight-hour shift (excluding a half-hour lunch break and the equivalent of two 15-minute breaks). Tr. 104:17 – 105:17. He typically starts at about 1:30 p.m., and typically the bottling line shuts down at about 3:30. Tr. 82:16-19. From then until maybe 7:30, but generally not that late, Tr. 91:17 – 92:7, he engages in cleanup, moves beer to the cooler with the forklift, and makes boxes. After 7:30, until his shift ends at 10:00, he is able to perform the ad hoc maintenance assignments left for him by the maintenance supervisor, except for time he spends cleaning up at the end of the shift. Tr. 61:17 – 65:12; 91:17 – 96:25. Over the course of the night, he may spend a half hour running the "Zamboni" cleaning the floor, Tr. 99:17-19, including 15 to 20 minutes at the end of his shift, when he operates the Zamboni and two co-workers do the other cleaning. Tr. 98:5-11.

Because he is "multi-tasking," Tr. 92:17 – 93:10, and sometimes does maintenance work during the day before 7:30 p.m., the following calculation probably errs on the side of understating the percentage of his time spent on "maintenance and

repair"—which he continued to estimate at 30 percent throughout his testimony. Tr. 104:2-13. Here's the calculation. Backing out his breaks (by law his half-hour lunch break and at least one-half of his two rest breaks must occur before the fifth hour of work (WAC 296-126-092(2) and (4)), this means at least two out of eight hours of work (from 7:30 to 10:00 less one-half hour cleaning with the Zamboni) are maintenance and repair activities. This would be 25 percent. When considering the multi-tasking nature of what he does after the bottling line shuts down, and the other qualifications as to what is a "typical" day, this calculation basically confirms his estimate that 30 percent of his time is spent doing maintenance and repair work.

B. The Regional Director's Conclusion That Fairbanks Did Maintenance Work Only 20 (or 22.67)[3] Percent of the Time Is Not Supported by the Record.

Fairbanks' testimony that in total, his maintenance work (including preventive maintenance work plus "ad hoc" maintenance work) amounted to 30 percent of his job [Tr. 65:9-12], was never shaken. He continued to estimate that 30 percent of his time is doing preventive maintenance and "ad hoc" maintenance tasks, done to some extent during the day but primarily at night after the maintenance supervisor and the other maintenance employee had gone home, leaving for him things they didn't get to during the day, to accomplish before the next day. Tr. 104:2-13.

Thirty percent of his eight-hour shift is a little less than two and one-half hours a day (144 minutes to be precise). Sixty minutes of that is, by the witness's estimate, doing daily preventive maintenance (lubricating machines and equipment, primarily). Tr. 94:17-25. Fairbanks testified he is generally through with any other work at least by

[3] Decision at p. 4 n.6.

7:30, if not earlier [Tr. 91:17-23; 102:5 – 104:1]; that leaves two and one-half hours until the end of his shift at 10:00. Fifteen to twenty minutes he is operating the Zamboni—his part in cleaning up. That leaves more than two hours. If not his assigned maintenance tasks, what else is he doing during that two hours? In fact, although his testimony may not be perfectly clear, Fairbanks actually estimated he spends two hours performing maintenance, one hour of it preventive maintenance. Tr. 94:17-25.

> Q (by the Hearing Examiner): Okay. And I know that you have testified to this earlier, but just refresh my memory, how many hours a night do you think you spend greasing?
>
> A Probably two.
>
> Q Two?
>
> A Typically two or between, well, probably an hour greasing.
>
> Q An hour?
>
> A Uh huh.

What the witness is saying is that between the greasing and the ad hoc maintenance, he spends an estimated two hours a night, one hour of it greasing. Two hours over an eight-hour shift is 25 percent. In addition there are those days that they don't prepare boxes at all—building boxes is a large percentage of his non-unit work—and days when Fairbanks does troubleshooting during the daytime, not just at night. Tr. 91:17 – 93:8; 81:15 – 82:11. So, two hours a day—25 percent—probably underestimates his unit work, but even so this is enough under the cases.

The Regional Director erred in concluding that the earliest Fairbanks can begin his maintenance work is 8 p.m. (Decision p. 4). This flat contradicts the testimony of Fairbanks that he generally is through with his work (including building boxes), other

than maintenance, before 7:30 or 8 p.m. Some of the two hours he estimated for making boxes occurs as early as the first part of his workday [Tr. 89:23 -90:3], and although he testified on a recent atypical day, they didn't finish building the boxes until 8 o'clock, he also testified it often happens that he is through building boxes before 7 o'clock [Tr. 102:5 – 103:2], and one out of ten days they don't make boxes at all. Tr. 103:3-7.

C. The Regional Director Erroneously Placed the Burden of Proof on the Employer, to Justify Including Mr. Fairbanks. Instead, the Burden Belongs on the Union as the Challenger to Show That Mr. Fairbanks Is Not an Eligible Voter, and That Burden Has Not Been Met.

Relying on *Harold J. Becker Co., Inc.*, 343 NLRB 51 (2004),[4] the Regional Director concluded that it is the Employer's burden to establish Fairbanks was eligible to vote. This was error. The party seeking to exclude an individual from voting has the burden of establishing that the person is in fact ineligible, as explained by Chairman Battista, dissenting in *Becker*.

True, the two-member majority in *Becker* placed the burden on the employer, in that case, to establish that the challenged workers were dual-function employees entitled to vote. Even so, their reasoning is distinguishable from the situation at hand.

Central to the *Becker* majority's analysis is their distinguishing of cases, including those cited by the dissent, which, as in this case, involved evidence that went directly to work performed by the individual employee whose status was in question. The problem in *Becker,* according to its majority, was that the employer did not provide estimates of the amount of time the disputed employees themselves spent performing unit work.

[4] Decision pp. 2-3.

Instead, the employer opted to provide evidence of how much unit work was being done at the jobsites, rather than worker-specific evidence establishing the amount of that unit work which was actually being performed by the individual employees in question. And that is why the two-member majority was "unable to conclude that they regularly performed duties similar to those performed by unit employees for sufficient periods of time . . . The problem is that this calculation fails to take account the fact that other crewmembers at a site may have been doing the sheet metal work (unit work) at any given time, while the disputed employees, who also did roofing and waterproofing work, may have been performing other types of work." *Becker* at **2.

What *Becker* calls a "burden of proof" really is a burden of production. *Becker* addresses the question what happens if the Employer fails to produce any evidence of how much unit work is being done by the challenged dual-function employee. That is not the situation in this case. The testimony by Mr. Fairbanks himself, and that of CEO Joe Bisacca, who was personally involved in the building and staffing of the new brewery in Georgetown, address directly the percentage of unit work being performed by the employee in dispute—Mr. Fairbanks. *Becker* does not apply here. Instead, the general rule that the burden of proof is on the challenger, is what applies here. And consistent with the cases cited by the *Becker* dissent (which were distinguished by the *Becker* majority), the evidence is sufficient to warrant including Mr. Fairbanks.

D. The Regional Director erred in concluding that a dual-function employee who spends 20 percent of his time doing bargaining unit work fails to meet the Board's established standards. Alternatively, if the current standards are a "bright line" 25 percent test, such a policy or rule should be reconsidered and changed.

No bright line 25 percent rule has been established, as the Regional Director's decision recognizes. In determining whether dual-function employees should vote, the Board looks to whether such employees regularly perform bargaining work for sufficient periods of time to demonstrate they have a substantial interest in deciding for or against union representation in regard to their wages, hours and working conditions. *Avco Corp.*, 308 NLRB 1045 (1992). Twenty percent—or 22.7 percent even by the Regional Director's calculations if the burden is not improperly placed on the Employer[5]—is sufficient to demonstrate that Bill Fairbanks has a legitimate interest in voting whether he wants union representation. So far as we are aware, since *Becker* rejected the 50 percent rule, no Board case has determined that a dual-function employee who works between 20 and 25 percent of his time doing bargaining unit work, is not an eligible voter, even though this falls just under a 25 percent rule-of-thumb which admittedly is not a "bright line" test.

E. Excluding Bill Fairbanks, Who Performs Maintenance Work as a Significant Part of His Day, and at the Same Time Including the Two Boiler Operators, Who Are Only "Temporary Employees," Would Result in Certifying a Union Chosen Only by Temporary Employees.

Chairman Battista in *Becker* complained that exclusion of the dual-function employees in that case, because their jobs were in transition to full-time unit work,

[5] *See* Regional Director's Decision, p. 4 n.6.

resulted in disenfranchising the very people who should have a say in choosing representation:

> These are the employees who will in fact be represented if the Union is chosen, and thus these are the employees who should have a voice in deciding whether to choose representation.

In a different way, the same principle is involved in the situation at hand. The vote in this case is two-to-two. The two employees who want a union—the boiler operators—are workers who were hired on a temporary basis: they were hired only until the Employer's brewers get "up-to-snuff" and get their boiler operators' licenses. After early delays, the Employer's plans for licensing the brewers have proceeded rapidly (as planned from the beginning), and four of the brewers have in fact now received their boiler operators' licenses. Declaration of Joe Bisacca, which was provided to the Regional Director and is attached hereto. The two temporary boiler operators positions will be eliminated, and along with them, the two incumbents of the jobs. That would leave, to be represented by the Union, only the maintenance worker who voted against union representation, if Bill Fairbanks, who also does significant maintenance work, does not get his vote counted. That's the wrong result, on policy grounds.

F. The Two Boiler Operators Are Temporary Employees Who Cannot Reasonably Expect Continued Employment. Certification of the Union Should Not Be Based on Their Votes.

Whether or not the employees are considered "temporary" depends on whether the termination of their employment is reasonably ascertainable, either by reference to a calendar date or to the completion of specific jobs or events, or the satisfaction of the condition or contingency for which the temporary employment was created. *Catholic*

Health Care West d/b/a/ Marian Medical Center, 339 NLRB 127, 129 (2003) (temporary assignment tied to specific conditions and events). The boiler operators work at the new Georgetown brewery qualifies as "temporary" under these standards.

Although the tenure of the two boiler operators was not certain to expire on an exact calendar date, such certainty is not required. To decide that union certification should not depend on how those two would vote, it is enough that the prospect of termination is sufficiently concrete to dispel a reasonable expectation of continued employment. *Id.*, citing *St. Thomas-St. John Cable TV*, 309 NLRB 712 (1992). The boiler operators at Elysian's new Georgetown brewery are temporary employees with no reasonable expectation of continued employment. They were hired for a job lasting only until the brewers get their Grade IV boiler licenses. Now that the brewers have boiler licenses, they themselves can legally operate the nearby boilers they use to boil the water for brewing. Boiler tending is a part-time duty, limited mostly to when brewing is occurring. Once they become familiar with operating the boiler at the Georgetown brewery, the brewers can easily handle the additional boiler tasks now that they have their boiler licenses. R (R-Hearing) Tr. 282:13 – 289:3.[6]

Correspondence admitted as exhibits in the "R" hearing amply demonstrates the company was making preparations to get its brewers "up to snuff" for their exams so they could get licensed, and that there was only temporary work for a Grade IV licensed

[6] Brewers themselves operate the boilers in small craft breweries throughout the state. R-Tr. 15:22 – 16:7 (Buhler); R-Tr. 53:3 – 55:12 (Bisacca); R-ER Ex. 7. "Boiler operating" is not a separate job in a craft beer brewery like Elysian's; it is an additional duty for the brewers (and secondarily plant managers). Brewers typically operate the boilers, not just at Elysian, but in the industry. R-Tr. 53:13 – 55:12 and R-ER Ex. 7, which is a list of craft breweries in this area employing brewers this way.

boiler operator in the meantime.[7] Plans to get the brewers their boiler licenses did not move forward as quickly as had been anticipated. Plans for training onsite with a city-certified instructor (Lily Tolisin) went on hold when she developed cancer and could not follow through. R-Tr. 62:10 – 64:9; 289:20 – 292:4 (Bisacca). Subsequently, she recovered, provided the training, and several brewers at Georgetown now have the required licenses. Bisacca Dec. ¶ 6, dated October 23, 2012 (attached).

CONCLUSION

Bill Fairbanks is a dual-function employee properly included in the unit and an eligible voter. The Regional Director's conclusion to the contrary is in error and his decision to sustain the challenge to Fairbanks' ballot should be set aside, resulting in a dead heat at two votes for and two votes against union representation, and accordingly

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[7] In Georgetown, by Seattle ordinance, a licensed boiler operator is required to be onsite while the boiler is operating because a high pressure boiler is used. R-Jt Ex. 1 (City Code); R-Tr. 16:11 – 17:11. The brewing staff in Georgetown was not yet licensed to tend high pressure boilers, so Elysian looked for a short-time boiler operator with the required Grade IV license in the meantime. R-Tr. 17:12 – 21:23 (testimony of Dave Buhler (VP/co-founder). In the other brewery in Georgetown with a high pressure boiler, operating the boiler is handled the same way: brewers get boiler licenses. R-Tr. 54:22 – 55:12 (testimony of Joe Bisacca, co-founder and CEO).

In the fall of last year, Elysian co-founder Dave Buhler sought a temporary boiler operator for the new brewery in Georgetown to meet the city's requirement for a licensed boiler operator onsite. At the time, Buhler expected the brewery team to start getting their licenses within the next couple of months, and needed a part-time operator in the meanwhile. R-Tr. 17:23 – 26:14 (Buhler testimony).

In late October and November of last year, Buhler started down the path to recruit a temporary boiler operator while he was making arrangements to get the brewers licensed. *See* R-ER Ex. 1 (October 18, 2011 Buhler email to Local 286, announcing the temporary opening); R-ER Ex. 2 (October 18, 2011 Buhler email to Daryl Walker (a city-approved instructor at Renton Technical College, who could satisfy the city's training requirements for the brewers to get boiler licenses); R-ER Ex. 3 (October 24, 2011 Buhler correspondence with Elysian's current boiler operator Tom Gochanour, about the temporary, part-time work); R-ER Ex. 4 (October 24, 2011 Buhler email to Elysian co-founder Joe Bisacca, discussing progress of plans to get the brewers licensed, and a short-term temporary solution in Al Triplett, who started Redhook); R-ER Ex. 5 (November 12, 2011 Buhler correspondence to Grant Walker, Daryl Walker's brother who was helping set up the boiler curriculum for teaching the brewers); and R-ER Ex. 6 (October 24 and November 12, 2011 Buhler email exchange with Tim Grant, who was referred by a Local 286 Shop Steward, about temporary boiler operator work for five to eight weeks, and curriculum development for the brewers).

the Union should not be certified. That result would be consistent with cornerstone labor policy: certification should not be based solely on the votes of temporary employees who cannot expect continued employment.

RESPECTFULLY SUBMITTED this 27th day of December, 2012.

s/Clemens H. Barnes
Clemens H. Barnes
GRAHAM & DUNN PC
Pier 70, 2801 Alaskan Way Ste 300
Seattle, WA 98121-1128
(206) 340-9681 (Barnes)
cbarnes@grahamdunn.com
Attorney for the Employer,
Elysian Brewing Co.

CERTIFICATE OF SERVICE

The undersigned certifies that he filed the foregoing **Employer's Request for Review** electronically with the NLRB and Region 19 of the NLRB, and emailed a true and correct copy to:.

Jeff Frazier
IUOE, Local 286
18 "E" Street SW
Auburn, WA 98001
jeff.frazier@iuoe286.org

I declare under penalty of perjury under the laws of the United States of America and the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 27th day of December, 2012.

s/Clemens H. Barnes
GRAHAM & DUNN PC
Pier 70, 2801 Alaskan Way Ste 300
Seattle, WA 98121-1128
(206) 340-9681 (Barnes)
(206) 340-9599 fax
cbarnes@grahamdunn.com
Attorneys for the Employer Elysian Brewing Company

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DECLARATION OF JOE BISACCA

I, Joe Bisacca, state and declare as follows:

1. I am the CEO of Elysian Brewing Co. I was directly involved in the construction and staffing of our new brewing facility on Airport Way in the Georgetown area of Seattle, Washington. Except as may be otherwise indicated, I make the following statements based on personal knowledge.

2. As I testified at the first hearing in this matter, the two boiler operators are only temporary employees. The temporary boiler operators are required only until the brewers get their Grade IV boiler licenses. Then the brewers can legally operate the nearby boilers they use to boil the water for brewing.

3. Correspondence submitted at that first hearing amply demonstrates that the company was making preparations to get its brewers "up-to-snuff with their exam" so that they could get licensed, and that there was only temporary work for a Grade IV licensed boiler operator in the meantime.

4. I also testified about the delay in getting the brewers certified. Plans for training onsite with the city-certified instructor (Lilly Tolisin) went on hold when she developed cancer and could not follow through.

5. I also testified to renewed efforts that had been made to present a class to the brewers onsite. Since while it is true, as the Union has stressed, that a definite date for certifying the brewers had not been established at the time of the hearing, it is absolutely clear that plans for licensing brewers have been in the works—that's been the plan all along—and, as a consequence, the employment of boiler operators has always been temporary and will end in the foreseeable future.

6. Now that time has come. After recovering from her cancer, Ms. Tolisin has conducted training of our brewers onsite, and as of now, four of the brewers have in fact been certified and have their boiler operators' licenses. As I have testified from the beginning and as the plans were from the beginning, the job of boiler operator will disappear, once the brewers get the licenses required by the city code for them to run their own boiler. That has now occurred and the two boiler operator positions—along with the two incumbents of the jobs—will be eliminated.

7. Such has been our plan from the very beginning, as we can well document. We are, of course, aware that the Union is going to claim these are reprisals against the two union supporters—the two boiler operators. Such allegations are false; from the beginning the two boiler operators were hired on a temporary basis, and their jobs were going to be eliminated once the brewers obtained their boiler licenses, as they are now doing and four have now done.

I declare under penalty of perjury under the laws of the United State of America and the state of Washington that the foregoing is true and correct.

Signed at Seattle, Washington this 23rd day of October, 2012.

Joe Bisacca